

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

DECISION OF MEDICARE APPEALS COUNCIL
Docket Number: M-11-944

In the case of

Kaiser Foundation Health
Plan/Kaiser Permanente Senior
Advantage

(Appellant)

Claim for

Medicare Advantage (MA)
Benefits (Part C)

(Enrollee/Beneficiary)

(HIC Number)

Kaiser Foundation Health
Plan/Kaiser Permanente Senior
Advantage

(MA Organization (MAO)/MA
Plan)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision on December 23, 2010. The ALJ's decision concerned the enrollee's request to obtain audiology services from a provider outside of the MA plan's network. The ALJ concluded that Kaiser Permanente Senior Advantage, the MA plan in which the enrollee was a member, was required to authorize out-of-network audiology services. The MA plan has asked the Medicare Appeals Council (Council) to review the ALJ's decision.

The Council reviews the ALJ's decision *de novo*.¹ 42 C.F.R. § 405.1108(a). The Council will limit its review of the ALJ's action to the exceptions raised by the party in the request for review, unless the appellant is an unrepresented beneficiary.

¹ The regulation at 42 C.F.R. § 422.608 states that the procedures for Medicare Part A and Part B appeals apply to Part C appeals "to the extent that they are appropriate." The Council has determined that, until there is amendment of the regulations governing the MA program or clarification by the Centers for Medicare & Medicaid Services (CMS), application of Part A and Part B appeal procedures, as outlined in 42 C.F.R. part 405, subpart I, is "appropriate" in this case.

Id. § 405.1112(c). The Council admits the MA plan's request for review and attachments into the record as Exhibit (Exh.) MAC-1. The Council has not received a response to the MA plan's request for review from the enrollee.²

The Council has reviewed the record and request for review. As explained below, the Council concludes that the MA plan is not required to authorize out-of-network audiology services in this case. Accordingly, the Council reverses the ALJ's decision.

BACKGROUND AND PROCEDURAL HISTORY

Based on the record, the enrollee has cochlear implants in both ears. As a component of the implants, the enrollee used "3G" speech processors. See Exh. 3. In November 2008, the MA plan approved coverage for the purchase of a "Freedom" processor to replace the enrollee's "3G" processor. See *id.* To program or "map" the new processor, the enrollee, in December 2008, went to an audiologist within the MA plan's network. See *id.* After the audiologist programmed the processor, the enrollee reported hearing a constant "humming" sound when using the processor. See *id.* From January to May 2009, the enrollee made visits to a plan audiologist to adjust the programming of the processor, but the audiologist was unable to resolve the humming sound heard by the enrollee.³ See *id.*

Then, in May 2009, the enrollee requested authorization to use a provider outside of the MA plan's network for programming of the "Freedom" processor. See Exh. 3. The enrollee also asked the MA plan to replace his old "3G" processors with new "3G" processors, if the "Freedom" processor could not be programmed to resolve the humming sound. See *id.* In response, the MA plan agreed to cover replacement "3G" processors, but denied the enrollee's request to go outside the MA plan's network for programming services. See *id.* at 1. The enrollee appealed the MA plan's denial, which was forwarded to an Independent Review Entity (IRE) for a reconsideration. See *id.* The IRE agreed with the MA plan's denial and reasons for the denial. See Exh. 5. By the date of the IRE's reconsideration, August 2009, the enrollee had received replacement "3G" processors. See Exh. 4

² The MA plan has informed the Council that it sent a copy of the request for review to the enrollee. See Exh. MAC-1.

³ The plan audiologist's attempts to resolve the enrollee's problem with the processor included ordering a second "Freedom" processor. See Exh. 2 at 5. Because the enrollee heard the same humming sound with the second "Freedom" processor, the audiologist returned the second "Freedom" processor to the manufacturer. See *id.*

at 5; Exh. 12 at 1. The enrollee, unhappy with the replacement processors because they were refurbished, not new, still sought out-of-network programming of a "Freedom" processor and filed a request for an ALJ hearing.⁴ See Exh. 6; Exh. 11.

After holding a hearing, the ALJ issued a favorable decision for the enrollee. The ALJ concluded that the MA plan must allow the enrollee to obtain an out-of-network "consultation" and must also make the "Freedom" processor available to the enrollee at that consultation. See Exh. 15. The MA plan requested Council review of the ALJ's decision, which upon review, the Council remanded to the ALJ.⁵ See Exh. 16; Exh. 18. In the remand, the Council clarified that the narrow issue in this case is whether the MA plan must authorize the enrollee to go outside the plan's network for processor programming services, not the processors themselves. See Exh. 18. The Council's remand directed the ALJ to adjudicate this issue only, develop the record as necessary, and consider, upon such development, whether the enrollee still needed the programming services.⁶ See *id.*

Following the remand, the ALJ held two hearings and then issued a second favorable decision for the enrollee. The ALJ found that, after developing the record, the MA plan's providers were unable to meet the enrollee's need "for a replacement processor" for his cochlear implants. See Dec. at 7. The ALJ explained that the MA plan's provider had only been able to provide the enrollee with refurbished processors. The ALJ concluded, then, that the MA plan must authorize and cover a consultation with an out-of-network provider.⁷

REQUEST FOR REVIEW

The MA plan contends that it is not obligated to authorize out-of-network services in this case. The MA plan argues first that the ALJ's decision incorrectly links the enrollee's need for the

⁴ Based on the record, the enrollee was provided refurbished "3G" processors because his "Freedom" processor was returned to the manufacturer after a trial period for the "Freedom" processor had ended. See Exh. 12 at 1.

⁵ The Council dismissed the MA plan's request for review initially, but then vacated the dismissal and reopened the MA plan's appeal. See Exh. 16; Exh. 18.

⁶ For example, the Council asked the ALJ to consider evidence in the record, a December 3, 2009 email from the enrollee, indicating that the enrollee had received new, not refurbished, "3G" processors and would receive programming from the MA plan's audiologist for those processors. See Exh. 14 at 5.

⁷ For additional background and procedural information, see the prior Council remand and ALJ decisions, which are incorporated by reference except as supplemented herein. See Exh. 15; Exh. 18; Dec. at 4-5.

processor with his request to go out-of-network for programming services. See Exh. MAC-1. The MA plan maintains that the issue appealed here is a referral for out-of-network programming, not coverage of a processor. See *id.* The MA plan argues, secondly, that "it was never established" that the plan's providers could not provide the necessary programming. See *id.* On this point, the MA plan notes that, during the enrollee's last visit with a plan audiologist, the audiologist programmed a new processor for the enrollee and the enrollee was satisfied with those services. See *id.* The MA plan adds that the enrollee has disenrolled from the MA plan. See *id.*

APPLICABLE LEGAL AUTHORITIES

According to the regulations, an MA plan must provide enrollees with coverage for all items and services covered by Medicare Part A and Part B that are available to beneficiaries within the plan's service area. See 42 C.F.R. § 422.101(a). In providing such coverage, the regulations permit MA plans to specify the network of providers from whom the enrollee must receive covered services.⁸ See *id.* § 422.112(a). However, if network providers are unavailable or inadequate to meet an enrollee's medical needs, the MA plan must arrange for, and cover, services outside of the MA plan's network. See *id.* § 422.112(a)(3).

DISCUSSION

After careful review of the record and applicable authorities, the Council concludes that the MA plan's contentions have merit.

First, the Council agrees with the MA plan that, as explained in the Council's prior remand, the issue in this case is limited to *programming* services for the enrollee's processor. The MA plan made a separate determination addressing only the enrollee's request to obtain such services outside the MA plan's network. See Exh. 3. The enrollee's appeal of that determination then proceeded through the appeals process, through which the plan's determination was reviewed and upheld by the IRE and appealed later to the ALJ. See Exh. 5; Exh. 6. As the MA plan contends, the ALJ's decision addresses a separate issue, Medicare coverage

⁸ An MA plan must inform enrollees of network restrictions, along with other conditions for coverage, in a clear, accurate, and standardized form. See 42 C.F.R. § 422.111(a)-(b). To satisfy this requirement, MA plans typically give enrollees an Evidence of Coverage (EOC) outlining the plan's benefits, coverage requirements, and costs. See, e.g., Exh. 1. The enrollee does not dispute receiving an EOC from the MA plan or that the MA plan imposed an in-network requirement.

of speech processors. See Dec. at 5–7. Based on a finding that the MA plan and its providers had supplied inadequate processors to the enrollee, the ALJ concluded that the MA plan must allow the enrollee to obtain out-of-network audiology services. See *id.* at 7. However, the ALJ erred by making a conclusion on such a basis, whether true or not, because the MA plan’s coverage and supply of processors was not an issue before the ALJ.⁹ The only issue on appeal is whether the MA plan had providers available within its network to provide programming services for the enrollee’s processors.

Second, the Council agrees with the MA plan that the record does not demonstrate that the plan’s providers could not provide the necessary programming services. To start, the MA plan’s network did include providers available and capable of programming the processors used by the enrollee, as the enrollee obtained such services from the plan’s audiologists on several occasions. See Exh. 2. The MA plan’s audiologists were also able to adjust the programming of the enrollee’s processors, after the enrollee had problems with the processors, such as the humming sound he heard with the “Freedom” processor. See *id.* Although the enrollee experienced problems with his processors for several months, the record indicates that, eventually, the enrollee was satisfied with the plan audiologist’s programming of his processors.¹⁰ See Exh. 24. In addition, the record contains no evidence that the out-of-network provider, from whom the enrollee sought services, was able to provide special programming services that the MA plan’s providers could not provide to the enrollee. Ultimately, then, the Council finds no factual or legal basis for requiring the MA plan to authorize out-of-network programming services in this case.

Finally, the Council clarifies, again, that to the extent that the enrollee was dissatisfied with the model, year, and quality of the processors supplied to him and covered by the MA plan, that issue relates to coverage of the processors themselves and is not before the Council in this case.

⁹ The record contains no procedural documents from the MA plan or IRE with regard to coverage of the enrollee’s processors.

¹⁰ Moreover, the record does not indicate that the apparent delay in resolving the enrollee’s problems with the processors was due to any particular action of the MA plan or its providers. For example, on two occasions, the plan’s providers set up appointments for the enrollee to meet with a representative from the “Freedom” manufacturer, but the “Freedom” representative did not attend the appointments. See Exh. 3. On another occasion, the enrollee, himself, did not show up to a scheduled appointment. See Exh. 14.

DECISION

For the above reasons, the Council concludes that the MA plan is not obligated to authorize coverage for out-of-network processor programming services. Therefore, the Council reverses the ALJ's decision.

MEDICARE APPEALS COUNCIL

/s/ Stanley I. Osborne, Jr.
Administrative Appeals Judge

/s/Constance B. Tobias, Chair
Departmental Appeals Board

Date: September 9, 2011